Control Services, Inc. *and* Local 32B-32J, Service Employees International Union, AFL–CIO. Cases 22–CA–16394 and 22–CA–16631

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On May 4, 1994, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel and the Charging Party filed exceptions and briefs. The Respondent subsequently filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] only to the extent consistent with this Decision and Order.[3]

The Respondent has provided cleaning and janitorial services at buildings I, III, and IV of the Gateway Complex in Newark, New Jersey, pursuant to a contract with Property Management Systems, Inc. (PMS) since June 10, 1989.[4] Prior to that time, Ogden Allied Maintenance Corporation (Ogden) was under contract to provide such services. Ogden's employees at the Gateway Complex were represented by the Charging Party, Local 32B-32J, Service Employees International Union (the Union). When the Respondent commenced operations at the Gateway Complex, it hired a new employee complement. Relying on testimony that he credited, the judge found that the Respondent did not discriminatorily deny employment to former Ogden employees and was not obligated to recognize and bargain with the Union because Ogden employees did not constitute a majority of its work force at the Gateway Complex.

We agree that the Respondent did not violate the Act with respect to former Ogden employees in buildings I and III of the complex.[5] For the reasons that follow, however, we find that the Respondent was obligated to recognize and bargain with the Union as the representative of employees in building IV, and that it violated Section 8(a)(5) and (1) by failing to do so.[6]

It is well settled that a successor employer is obligated to recognize and bargain with the collective-bargaining representative of its predecessor's employees when the predecessor's employees comprise a majority of its work force and the collective-bargaining representative demands bargaining in an appropriate unit. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

The record establishes that Ogden extended recognition to the Union as the exclusive bargaining representative of its employees in three separate units, as alleged in the complaint, distinguished by the buildings in which the employees worked—Gateway building I,

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge made some errors that do not affect the disposition of the case. First, he credited the ''denials'' of the Respondent's vice president for operations, Thomas Martin, over the testimony of former employee Daniel Rivera that Martin said the Respondent did not want to ''gamble'' with the Union. In fact, Martin never denied making such a statement. Notwithstanding that Rivera's testimony in this regard is therefore unrebutted, we note that the judge generally discredited Rivera, finding him to be an unreliable witness who admitted wanting ''to stick it to [the Respondent].'' The judge also incorrectly stated that ''Ogden had separate contracts with the Union to perform cleaning services.'' As explained in more detail below, the record establishes that Ogden's cleaning services contracts were with the property management company that managed the Gateway Office Building Complex (Gateway Complex). Ogden also had separate, single-site collective-bargaining agreements with the Union. Finally, the record does not substantiate the judge's statement that he told counsel for the General Counsel that she would be permitted to call all of the Ogden employees who allegedly completed applications at the Quality Inn as witnesses. We note that the General Counsel's failure to call more than a few applicants as witnesses does not appear to have been based on any representation made by the judge.

[2] We adopt the judge's findings, to which no exceptions have been filed, that the Respondent violated Sec. 8(a)(2) and (1) by rendering unlawful assistance to Teamsters Industrial and Allied Workers Union, Local 97, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO, and that it violated Sec. 8(a)(2), (3), and (1) by executing, maintaining, and enforcing a collective-bargaining agreement with Local 97 that contained a union-security provision, at a time when Local 97 did not represent an uncoerced majority of the Respondent's employees.

[3] The judge's recommended Order is modified to include a broad remedial order. As stated in *Hickmott Foods*, 242 NLRB 1357 (1979), such a provision is warranted, ''when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for . . . fundamental statutory rights.'' We find that this standard is met in view of the Sec. 8(a)(5), (3), (2), and (1) violations found here, as well as the prior findings of unfair labor practices against the Respondent reported at 315 NLRB 431 (1994); 314 NLRB 421 (1994); 305 NLRB 435 (1991); and 303 NLRB 481 (1991).

We shall revise the judge's dues and fees reimbursement remedy so that it conforms to the Board's standard remedy. See *Cascade General*, 303 NLRB 656 (1991), enfd. 997 F.2d 571 (9th Cir. 1993).

[4] All dates are in 1989 unless otherwise stated.

[5] The Charging Party and the General Counsel have excepted to the judge's findings regarding the precise number of Ogden employees who applied for positions with the Respondent and the number who were thereafter employed. Although the judge's findings may be subject to dispute to a certain extent, the record clearly shows that former Ogden employees comprised less than a majority of the Respondent's employees at buildings I and III even under the contentions raised by the Charging Party and the General Counsel.

[6] The General Counsel and the Union have filed separate exceptions regarding building IV.

III, or IV. Ogden was signatory to two collective-bargaining agreements, executed December 16, 1986, one covering the employees in building I and the other covering those in building III.[7] Further, Ogden was a member of the Service Employers Association, which executed a Master Agreement with the Union, effective from January 1, 1987, through December 31, 1989. James Canavan, Ogden's manager of labor relations at all relevant times, testified that Ogden recognized the Union as the representative of its employees in Gateway IV when Ogden began servicing that site in 1988. No specific site agreement or location rider was ever negotiated for the approximately 25 Gateway IV employees.[8]

Ogden held the cleaning and janitorial services contract until early June. On May 15, soon after learning that the Respondent was to become the new cleaning contractor at the Gateway Complex, the Union sent a letter to the Respondent, advising that it represented Ogden's employees at buildings I, III, and IV, and making ''unconditional application for employment'' on behalf of the employees. The letter further stated, ''We would be happy to meet with you as soon as possible to negotiate an agreement to cover the employees employed at the Gateway Complex.'' Thereafter, on June 1, the Union sent another letter to the Respondent in which it requested that the latter contact it ''to schedule negotiations for the purpose of collective bargaining concerning the terms and conditions of employment of these individuals who are, and will continue to be, represented by [the Union].''[9]

As the judge found, the Respondent did not act unlawfully in making its hiring decisions regarding applicants who were former Ogden employees. The Respondent's vice president of operations, Thomas Martin, however, testified that the Respondent hired a majority of former Ogden employees to work at building IV when it commenced operations in early June. Specifically, he testified that 90 percent of the employees at that site were former Ogden employees.

Based on the foregoing, we find that the Respondent hired a majority of Ogden employees as its employee complement in the established unit in building IV. Although Martin further testified that there was no demand for bargaining in this unit after the employees were hired, we note that the Union's May 15 and June 1 letters, which demand bargaining and necessarily encompass a demand for recognition, ripened once the employee complement was hired for building IV. *Fall River Dyeing Corp.*, supra. We further note—in light of the complaint's allegations that there are separate single-site units, the presumptive appropriateness of single facility units, and the Union's prior separate representation of employees at each location—that it is incumbent on the Respondent to present countervailing evidence that the building IV unit is inappropriate.[10] Therefore, by failing and refusing to recognize and bargain with the Union with respect to the employees in that unit, the Respondent has violated Section 8(a)(5) and (1) of the Act.

AMENDED REMEDY

In addition to the remedy provided for in the judge's decision, we shall modify his reimbursement remedy as it pertains to dues and fees that may have been paid to Local 97. The Respondent shall be required to reimburse all employees for union dues, fees, assessments, and other payments that may have been exacted from them pursuant to the union-security provision of the Local 97 collective-bargaining agreement. We note, however, that the Respondent need not reimburse any employees who voluntarily joined Local 97 before June 13, 1989, the date the contract became effective. See *A.M.A. Leasing, Ltd.*, 283 NLRB 1017, 1025 (1987). Interest on these sums shall be computed in accordance with the formula approved in *New Horizons for the Retarded*, 283 NLRB 1173 (1982).

ORDER

The National Labor Relations orders that the Respondent, Control Services, Inc., Secaucus, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Local 32B-32J, Service Employees International Union, AFL–CIO as the exclusive collective-bargaining representative of all cleaning employees, excluding window cleaners, employed by the Respondent at building IV of the Gateway Complex.

[7] The agreement covering the Gateway I unit was effective until April 30, 1987, and the agreement covering the Gateway III unit was effective until May 31, 1987. Both contracts automatically renewed from year to year. With the exception of the recognition articles, expiration dates, and a paragraph concerning the forfeiture of holiday pay that appeared in the Gateway I contract but not in the Gateway III contract, the collective-bargaining agreements are identical. Ogden was also party to virtually identical ''location riders'' covering Gateway I and Gateway III that set forth the wage increases and pay rates to be instituted in 1987, 1988, and 1989.

[8] Although Canavan testified that Ogden extended recognition under the Master Agreement on behalf of Gateway IV employees, the record indicates that in the absence of a site agreement, Ogden set wages and other benefits for those employees independently.

[9] Each letter was mailed with attachments. The May 15 letter included lists of the Ogden employees working in each building and the employees' social security numbers and rates of pay. The June 1 letter was sent with employment applications on behalf of the Ogden employees.

[10] Given the historically recognized units, the fact that the Union's general demand for recognition and bargaining necessarily encompassed all three units of employees employed at the Gateway Complex and that a majority of unit employees was hired only in one of those units does not render the demand inappropriate as to the unit in which the majority was hired.

(b) Assisting the organizational activities of Teamsters Industrial and Allied Workers Union, Local 97, a/w International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America, AFL–CIO or any other labor organization.

(c) Recognizing or bargaining with Local 97, or any other labor organization, at a time when such labor organization does not represent an uncoerced majority of the Respondent's employees.

(d) Enforcing or maintaining the collective-bargaining agreement containing union-security provisions between the Respondent and Local 97.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with Local 32B-32J as the exclusive collective-bargaining representative of all cleaning employees, excluding window cleaners, employed by the Respondent at building IV of the Gateway Complex and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Reimburse all employees for union dues, fees, assessments, and other payments that may have been exacted from them pursuant to the union-security provision of the unlawfully maintained collective-bargaining agreement between the Respondent and Local 97, as set forth in the amended remedy.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Secaucus, New Jersey facility copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recognize and bargain with Local 32B-32J, Service Employees International Union, AFL–CIO as the exclusive collective-bargaining representative of all cleaning employees employed at building IV of the Gateway Complex.

WE WILL NOT assist the organizational activities of Teamsters Industrial and Allied Workers Union, Local 97 a/w International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America, AFL–CIO or any other labor organization.

WE WILL NOT recognize or bargain with Local 97, or any other labor organization, at a time when such labor organization does not represent an uncoerced majority of employees.

WE WILL NOT enforce or maintain the collective-bargaining agreement with Local 97 containing union-security provisions.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with Local 32B-32J as the exclusive collective-bargaining representative of all cleaning employees, excluding window cleaners, employed at building IV of the Gateway Complex and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL reimburse all employees for union dues, fees, assessments, and other payments that may have been exacted from them pursuant to the union-security provision of the unlawfully maintained collective-bargaining agreement with Local 97, with interest.

CONTROL SERVICES, INC.

Marguerite Greenfield, Esq., for the General Counsel.
David Lew, Esq. and Eric C. Stuart, Esq. (Peckar & Abramson), for the Respondent.
M. J. Nelligan, Esq. (Apruzze, McDermott, Mastro & Murphy), for Property Managment Systems.
Larry Engelstein, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was heard before me on January 7, 8, and 9 and September 10, 1991, April 28, 1992, and June 14, 1993, in Newark, New Jersey.

Between June 23 and November 23, 1989, unfair labor practice charges were filed by Local 32B-32J, Service Employees International Union, AFL–CIO (the Union) against Control Services Inc., and Property Management Services Inc. (Respondent and PMS), respectively. On May 4, 1990, a consolidated complaint issued alleging that Respondent and PMS, as joint employers, had violated Section 8(a)(1), (2), (3), and (5) of the Act. During the course of the hearing of this case, counsel for the General Counsel moved to withdraw the charges alleged in the complaint against PMS. The motion was granted by me and the complaint allegations alleged against PMS were dismissed.

On the entire record, including my observation of the demeanor of the witnesses, and a consideration of the posttrial briefs, I make the following

FINDINGS OF FACT

Respondent is a corporation with an office and place of business in Secaucus, New Jersey, where it is engaged in the business of providing cleaning and janitorial services to various commercial enterprises located in New Jersey, and other States of the United States. Respondent, in the course of such business operations, annually performs cleaning and janitorial services for such enterprises located outside the State of New Jersey, valued at in excess of $50,000. It is admitted and I find that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted and I find that the Union and Teamsters Industrial and Allied Workers Union, Local 97, International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Local 97) are labor organizations within the meaning of Section 2(5) of the Act.

Prior to May 1989, the Union represented a unit of janitorial and cleaning employees who were employed by Ogden Allied Maintenance Corporation (Ogden). Ogden performed cleaning services and maintenance for a building complex called the Gateway Office Building Complex (Gateway Complex). The Gateway Complex was owned by Prudential Insurance Company (Prudential). Property Management Systems (PMS) was Prudential's property manager. PMS, as the property manager for Prudential, negotiated with cleaning and maintenance contractors for Prudential's properties, including Prudential's Gateway Complex.

Prior to 1989, Ogden had a contract with PMS to perform cleaning and maintenance services at the Gateway Complex. Specifically, Ogden had separate contracts with the Union to perform cleaning services at Gateway building I and III and applied the terms of its Gateway III contract to Gateway building IV. As set forth above, the Union represented the cleaning employees employed by Ogden at these three Gateway locations. The maintenance employees were represented by another local, discussed below.

Sometime during the spring of 1989, PMS opened bids for the cleaning contractors at the Gateway Complex. Ogden and Respondent were among the cleaning contractors submitting bids. Respondent was the low bidder and was awarded the cleaning contract.

Sometime in early May, PMS notified the Union that Respondent was the low bidder and had been awarded the cleaning contract for the Gateway Complex. On May 15 the Union sent a letter signed by Union Representative McCulloch that set forth an ''unconditional application for employment'' on behalf of the cleaning employees presently employed by Ogden at the Gateway Complex.

On receipt of the Union's May 15 letter, McCulloch was contacted by Respondent's attorney, Joel Keiler. Keiler informed McCulloch that Respondent would not accept the Union's application for employment on behalf of the Ogden employees, but stated that all applicants for employment by Respondent would have to fill out an individual application and submit to a personnel interview. In this connection Keiler informed McCulloch that Respondent would place an ad in a local newspaper setting forth Respondent's hiring procedures for all applicants.

Respondent thereafter placed an ad in a local newspaper that set forth that applicants who wanted to be considered for employment by Respondent at the Gateway Complex should report to the Quality Inn, a local hotel, between May 31 and June 2, 1989, and fill out an application, at which time they would be interviewed.

The union records indicate that Ogden employed approximately 102 cleaning employees who were members of the Union. These records, which may not necessarily be accurate indicate that of the total Ogden complement of 102 union members, only 66 employees presented themselves at the Quality Inn and filled out an application. Of these 66 union member employees, Respondent hired 39 applicants, a percentage of 60 percent. The General Counsel failed to produce the actual applications filled out by the applicants and submitted to Respondent. Moreover, the General Counsel only called 2 of the alleged 66 applicants to testify as to their making a proper application for employment with Respondent, although the issue as to the number of applicants applying for jobs with Respondent was raised, and I stated to counsel for the General Counsel that she would be permitted to call as witnesses all 66 alleged discriminates in order to establish the actual number of applicants.

Instead, the General Counsel relied on the testimony of Union Representative Nick Caprio, who testified that he and Ogden Supervisor Danny Rivera, transported an undetermined number of alleged discriminatees, in groups of 10, to the Quality Inn in order to apply for jobs with Respondent. I find Caprio's testimony to be unreliable, however. When further questioned about the details of the transportation of applicants, Caprio admitted that he was not even present at the Quality Inn, but instead relied on information furnished to him by ''representatives of Ogden Allied,'' presumably Rivera. Although Rivera was called as a witness by the General Counsel, however, he failed to testify that he transported even a single employee for an employment interview at the Quality Inn.

On June 2, 1989, Caprio went to the Quality Inn and handed Thomas Martin, a Respondent representative, a letter dated June 1 and a stack of applications allegedly filled out by the employees, numbering somewhere between 89 and 101. The June 1 letter stated that the Union's ''blanket application'' of the Union's May 15 letter had been rejected and that the Company required ''actual filled out applications from each applicant.'' Thus, it appears that the Union was still attempting to submit applications on behalf of the Ogden employees, notwithstanding its admitted knowledge that Respondent required each applicant to appear in person and fill out an application, and submit to an interview if required. Moreover, an examination of the applications submitted to

Respondent on June 2 establish that a majority of such applications were either unsigned, undated, or otherwise not completed. On receiving the applications from Caprio, Martin informed Caprio that the employees were required to appear in person to fill the applications out and the applications handed him by Caprio purporting to be filled out by the employees would not be considered.

Prior to interviewing employees for hire at the Gateway Complex, Respondent hired then Ogden Supervisor Danny Rivera to supervise the new complement of employees to be hired by Respondent. Rivera was to start the job on June 10. Rivera testified that on or about May 15, before he began working for Respondent, Martin asked him for a list of qualified employees. Rivera then incredibly testified that Martin told him that Respondent intended to hire the Ogden employees. Rivera then testified that when he began working for Respondent on June 10 he observed that many of the former Ogden crew were not employed by Respondent. Rivera then incredibly testified that when he asked Martin about this Martin replied that it was Respondent's desire to avoid dealing with the Union and they did not hire the Ogden employees because they did not want to gamble with the Union. Martin denied making the above statements attributed to him by Rivera.

I credit Martin's testimony with respect to his denial of the antiunion statements attributed to him by Rivera. Martin impressed me as a generally credible witness. He was responsive to questions put to him on both direct and cross-examination. He did not attempt to embellish his testimony, but appeared sincere and truthful. I was generally impressed with his demeanor.

Rivera, on the other hand, impressed me as an unreliable and incredible witness. His demeanor was that of a hostile witness. In this regard, he admitted that he was ''trying to stick it to Control.'' Moreover, I don't believe that Martin would make such admissions to a new employee, formerly employed by Respondent's predecessor. Rivera's testimony in this regard impresses me as being fabricated and consistent with his intention to ''stick it to Control.''

Sometime during the first week in June 1989, Arnold Ross, president of Local 97, became aware that Respondent had an ad in a local newspaper soliciting employment applications for employment at the Gateway Complex. Ross was familiar with the cleaning service contractors in the area because he had collective-bargaining agreements with other contractors. In an attempt to organize this shop, he sent down an unemployed individual, Gary Cerasini, who had applied for a job with Local 97, to fill out an application with Respondent. Ross worked out an agreement with Cerasini that if he obtained employment he would distribute Local 97 authorization cards and help Local 97 organize the shop. Ross agreed to pay Cerasini a certain sum of money for such efforts.

Cerasini filled out an application for employment with Respondent at the Gateway Complex and was notified by Respondent that he was hired. On June 10, Ross and several Local 97 representatives accompanied Cerasini to the Gateway Complex where about 50 individuals, either employees already hired or applicants for employment, were gathered. Ross, the other Local 97 representatives, and Cerasini solicited and obtained about 69 authorization cards. Respondent Representative Martin admitted that he was aware of the organizational activity by Local 97, and he instructed Respondent's supervisors to permit such activity. On June 12, Cerasini reported to work and solicited about 26 additional authorization cards. These cards were returned to Ross.

On June 13, Ross visited Respondent and met with Edward Turen, Respondent's president. Ross demanded recognition, showed Turen the authorization cards, and Turen examined the cards and granted Local 97 recognition. At this point Ross, who happened to have a copy of the Local 97 standard agreement, suggested that the parties commence negotiation, and negotiations took place that same day. Negotiations were completed later that day and a collective-bargaining agreement executed.

Respondent's first complete payroll of the employees who began working on June 12 was the June 23 payroll that contains 105 unit employees. An examination of the authorization cards submitted by Ross to Turen, that were dated June 10 and 12, when compared with Respondent's June 23 payroll establishes that 40 of the 95 individuals who signed authorization cards were actually employed by Respondent. It is therefore clear that at the time that recognition was granted and the collective-bargaining agreement executed, Local 97 did not represent a majority of Respondents unit employees.

From June 13, 1989, the date that the Local 97 contract was executed until some unknown date prior to January 7, 1991, the date this trial commenced, Respondent applied the terms of its Local 97 contract to all unit employees. At some date prior to the commencement of this trial Local 97 disclaimed interest in the Gateway unit, pursuant to an AFL–CIO decision.

Respondent employee James Rutherford testified that a few days before his testimony at this trial, January 7, 1989, he showed Respondent Supervisor Patrick Kinsella the subpoena he had received and asked Kinsella if there would be any problem. Kinsella replied maybe, he didn't know, but that if Respondent did anything as far as getting Rutherford fired, it would be in a roundabout way.[1]

Kinsella testified that Rutherford told him that he had a subpoena and showed it to him. Kinsella asked Rutherford if he could make a copy of it. Rutherford said OK, and Kinsella made a copy and handed the original back to Rutherford. Rutherford then said he would have to appear and Kinsella replied that he would have to appear. Rutherford then asked if he would get paid for the day and Kinsella replied that he wasn't sure.

I credit the testimony of Kinsella. His version as to what took place has a certain ring of truth. It strikes me as logical that a supervisor would want to have a copy of the subpoena for its records to be able to have a written record in its files as to the reason for Rutherford's absence from work on the day he appeared at the trial and gave testimony. It also strikes me as logical that Rutherford would want to know whether he would be paid for the day. Kinsella's response to this question is also logical, since a layman would not ordinarily know the answer to such a question, and the natural response would be to hedge and reply that he wasn't sure. Rutherford's testimony, on the other hand, does not strike me as logical. There is no evidence that Kinsella was aware as to what issue, or how Rutherford would testify. Further, it

[1] The General Counsel amended the complaint to allege this as a threat to discharge, in violation of Sec. 8(a)(1) of the Act.

does not seem logical to me that a supervisor would volunteer such obviously damaging action, in response to a subpoena, as a discharge, and then further volunteer that such action would be accomplished in a roundabout manner.

Analysis and Conclusions

It is well settled that an employer who submits a winning bid for a service contract is not under any legal obligation to hire any employees of the predecessor. *NLRB v. Burns Security Services*, 406 U.S. 272 fn. 5 (1972). Similarly, there is no legal obligation on the part of an employer to initiate the employment relationship. An employer is entitled to consider all applicants on an equal nondiscriminatory basis without giving any preference to the former unit employees. *Textron, Inc*., 302 NLRB 660, 662 (1991); *Montfort of Colorado* 298 NLRB 73, 78 (1990).

It is also well settled that an employer can establish its own hiring procedures, including a requirement that each employee applicant present himself at the employer's facility, fill out an employer's form application, and submit to an interview, if necessary. *Montfort*, supra. Moreover, the Board also held in *Monfort* that an employer need not consider an employee who does not apply for work pursuant to the employer's formal hiring procedure. In this connection, it was held in *Maid in New York*, 289 NLRB 524, 526 (1988), a case involving the Union here, that where an employer required employees to report to its facility and personally fill out an application for employment, a mailgram sent by the union was insufficient, as it did not comply with the employer's established procedure, and the employer's refusal to hire employees pursuant to the union's mailgram was not discriminatory. See also *Kessel Food Markets*, 287 NLRB 426, 431 (1987).

Applying the legal principles to the instant case, it is clear that Respondent was not required to hire the unit employees employed by Ogden simply because Respondent succeeded Ogden as the cleaning service contractor. Additionally, Respondent was free to require a hiring procedure when the employee applicants were required to present themselves at the employer's facility, in this case, the Quality Inn, on prescribed dates and personally fill out an application for employment and be interviewed, if necessary. Moreover, it is clear that the Union's attempts to make application for employment on behalf of its members by the Union's May 15 letter and the June 2 letter accompanied by an undetermined number of applications for work was insufficient, and did not comply with Respondent's procedure. It is also clear that the Union was aware that Respondent required the employee applicants to appear in person and fill out an employment application, and that the Union's attempts to apply on behalf of the employees was unsatisfactory to Respondent. In this regard Respondent's attorney, Keiler, specifically informed Union Agent McCulloch that such personal appearance by the employee applicant was necessary and that the Union's attempts to apply on behalf of the employees was unsatisfactory.

The Board has held that a customary perquisite to an unlawful refusal-to-hire allegation is evidence that the alleged discriminatees have sought work with the employer. *Sunland Construction Co*., 311 NLRB 685, 686 (1993). In the instant case, with the exception of alleged discriminatees Rosa Horton and Martha Fernandez who testified that they filled out applications, the General Counsel has failed to establish that any other alleged discriminatee filled out an employment application with Respondent.

I will assume the General Counsel's best case; that summaries based on the Union's records, which I have already concluded are not reliable, are accurate. These records reflect that of the total number of unit employees, 102, only 66 employees presented themselves at the Quality Inn and filled out applications as required by Respondent, and of these 66 employees, 39 of them or 60 percent were hired. Such percentage tends to rebut the discriminatory hiring practices alleged by the General Counsel. In addition, it is admitted that Respondent actually hired a majority of the Ogden employees, represented by the Union, at the Gateway building IV, which was one of the facilities that the Union represented when the cleaning services were performed by Ogden.

Thus, not only has the General Counsel failed to establish that the alleged discriminatees applied for employment, but even a consideration of the General Counsel's best case fails to establish a discriminatory hiring pattern by Respondent.

In determining whether an employer discriminates against employees because of their membership in, or activities on behalf of, a labor organization, the General Counsel has the burden of proving that the employees' membership in, or activities on behalf of, such a labor organization were a motivating factor in the discrimination alleged. Only when such factor is established does the burden shift to the employer, who then must establish that such action would have taken place in the absence of the employees' membership in or activities on behalf of a labor organization. *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1080 (1980), enfd. 662 F.2d 899 (1st. Cir.), cert. denied 455 U.S. 989 (1982).

The General Counsel contends that a discriminatory motivation is established because Respondent failed to proffer a convincing rationale for its failure to hire the Ogden employees represented by the Union. I find the General Counsel's contention without merit in view of the General Counsel's failure to establish that any but two Ogden employees actually made application for employment with Respondent and its admissions that according to the Union's unofficial or authentic records, only 66 employees out of 102 unit employees actually applied for work and that Respondent hired 60 percent of these applicants, including a majority in Gateway building IV. Rather, I conclude that in the absence of any evidence that Respondent's excluded former Ogden employees Respondent has no burden to justify its hiring practices. *Textron, Inc*., 302 NLRB 660, 662 (1991).

Another component lacking in the General Counsel's case is evidence of union animus. It is clear that there is not a scintilla of independent evidence of animus in the instant case. The General Counsel does not contend to the contrary. Rather, the General Counsel contends that animus is established by a history of unfair labor practice cases in other Respondent units represented by the Union. I reject this contention. It is well settled that prior Board decisions in other cases involving the same parties, without any independent evidence of animus established in the instant case is insufficient to establish such animus. *P.A. Inc*., 259 NLRB 833 (1981).

The General Counsel, lacking the essential elements of a prima facie case, bases its contentions of Respondent's al-

leged discriminatory refusal to hire and its unlawful recognition of Local 97 on the deposition and illegible notes of Kip Marshall, a representative of PMS, the employer herein who awarded the cleaning service contract to Respondent.

Kip Marshall, a representative of PMS was subpoenaed by the Union to testify in the instant trial, however, after persistent attempts, including a subpoena enforcement proceeding, both the General Counsel and the Union were unable to produce Marshall to testify. In the absence of Marshall's testimony, the General Counsel attempted to introduce a deposition of Marshall taken in connection with an action brought by the Union against PMS alleging that PMS violated the Worker Adjustment and Restraining Notification Act (WARN). The primary issue in that proceeding was whether PMS and Ogden were joint employers, in connection with the loss of employment by the Ogden employees represented by the Union as a result of the termination of Ogden as the cleaning contractor at the Gateway Complex. Respondent was not a party to this proceeding, nor did Respondent participate in any way in this proceeding.

The General Counsel contends that Marshall's deposition, taken at the above proceeding, and his notes, which he authenticated during his deposition, establish that a Respondent representative told Marshall that Respondent was going to recognize Local 97 prior to the date that Respondent was to commence its cleaning contract with PMS. It is also contended that representatives of Respondent actually showed Marshall a copy of an executed Local 97 collective-bargaining agreement and informed Marshall that the employees represented by the Union would not be considered for employment by Respondent. It is the General Counsel's contention that by such admission, Respondent's discriminatory intention not to hire Ogden employees represented by the Union, its unlawful recognition of Local 97, and execution of an unlawful collective-bargaining agreement can be established.

Without making a determination as to whether Marshall's deposition and his notes are admissible pursuant to Federal Rules of Evidence, Rule 804(b)(1), it appears clear from an entire reading of the deposition that the deposition does not establish what is contended by the General Counsel, and that in view of the fact that counsel for Respondent was denied the opportunity to cross-examine Marshall, and I was denied the opportunity to observe the demeanor of the witness and to question the witness, I would conclude that the deposition is entirely unreliable, incredible, and entitled to zero weight, even if the deposition were admitted pursuant to Rule 804(b)(1).

Moreover, an examination of Marshall's deposition does not support General Counsel's contention. In this regard Marshall initially testified:

> Q. Now did PMS know prior to the time that Control actually commenced operations in June 1989, which union Control was going to recognize for the janitorial employees.
>
> A. Yes.
>
> Q. Which union was that.
>
> A. It was the Teamsters union.
>
> Q. When did Control tell you that.
>
> A. We made them show us a copy that they had of an agreement with Local 68 [Operating Engineers] and with the Teamsters before we signed the contract.

At a later point in his testimony, however, Marshall recanted such testimony when he testified:

> A. I know they [Control] showed me [contract] for Local 68 [Operating Engineers]. I'm not certain I saw the one for the Teamsters. I don't think I saw the one for the Teamsters . . . I just don't remember if I saw it or not, I just don't remember.

Similarly Marshall never testified that Respondent would not hire members of the Union at Gateway. In this connection pursuant to leading questions put to him by counsel for the Union, who was also counsel for the Union in the instant case, Marshall testified:

> Q. Did they [Respondent] say anything about hiring the Ogden Allied employees who worked at that location.
>
> A. I don't think I asked them about that.
>
> Q. I didn't ask you that. I asked you if they said anything.
>
> A. I don't think so.
>
> Q. You have no recollection whether they did or not.
>
> A. I don't think they said anything about that.

Thus, it is clear that Marshall's testimony does not support the General Counsel's contention, and is contradictory and unreliable. Moreover, as both Respondent and I were deprived of the opportunity to question this witness on what purports to be such crucial testimony, and I was additionally deprived of the opportunity to observe the demeanor of the witness, I would find such testimony both unreliable and incredible, if the deposition were admitted pursuant to Rule 804(b)(1).

With regard to Marshall's notes adopted by him during his deposition, I informed the parties on the record that I found such notes illegible and meaningless that I would not consider them unless there was some agreed-on interpretation. On further examination, I find that there is simply no way for me to determine what these notes mean. To me they are meaningless and indecipherable. Moreover, in view of my conclusion as to the unreliability of Marshall's deposition, I am certainly not going to give to such notes any greater weight then I gave to his deposition, which was zero.

Accordingly, I find the contents of Marshall's deposition and his notes do not support the General Counsel's contention and are unreliable, incredible, and entitled to no weight, even if one were to conclude that they were admissible.

I therefore conclude that the General Counsel has failed to establish a prima facie case that Respondent discriminatorily refused to hire members of the Union as alleged in the complaint.

In view of my conclusion that the General Counsel failed to establish that Respondent discriminatorily refused to hire the alleged discriminatees, there is no evidence that the Union at any time represented a majority of Respondent's employees. Accordingly, Respondent had no obligation to recognize and bargain with the Union. See *NLRB v. Burns*

Security Services, 406 U.S. 272 (1972); *R & L Cartage & Sons*, 292 NLRB 530 (1989).

The evidence establishes that on June 13, 1989, the date Respondent recognized and executed a collective-bargaining agreement with Local 97, Local 97 did not represent an uncoerced majority of employees. In this regard, on June 23, the date reflected in Respondent's payroll records as the date when Respondent's full payroll was in place, Respondent employed 105 employees. However, Local 97 had obtained only 40 authorization cards signed prior to June 13. Respondent's first payroll of 16 employees obviously did not represent a representative complement of employees. See *Cascade General*, 303 NLRB 656, 656–657 (1991). Moreover, as to this payroll, Local 97 had obtained only two authorization cards prior to the June 13 date of recognition. It is well settled that postrecognition cards cannot be counted toward a union's majority support. *Human Development Assn.*, 293 NLRB 1228, 1228–1229 (1989). Accordingly, I conclude by recognizing and executing a contract with Local 97 at a time when Local 97 did not represent an uncoerced majority of Respondent's employees, Respondent violated Section 8(a)(1) and (2) of the Act. *Ladies Garment Workers (Bernard-Altman Corp.) v. NLRB*, 366 U.S. 731 (1961). Because the collective-bargaining agreement between Respondent and Local 97 contained a union-security clause that was enforced by Local 97, I also conclude that Respondent additionally violated Section 8(a)(1) and (3) of the Act. See *C. J. Rogers Transfer*, 300 NLRB 1095, 1097 (1990).

The evidence also establishes that Respondent was aware that Local 97 was in its facility on June 10, distributing authorization cards to its employees. Nevertheless, Respondent permitted such distribution, and directed its supervisors to permit the Local 97 representatives to continue such distributing. By engaging in such conduct, I conclude that Respondent violated Section 8(a)(1) and (2) of the Act. See *Meyer's Cafe & Konditorei*, 282 NLRB 1, 4 (1986).

As set forth in the statement of facts, above, there is no credible evidence to establish that Respondent threatened to fire employees because of their membership in the Union, or because they were subpoenaed to testify in the instant trial.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of the Act, I shall recommend it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Although the record establishes that Local 97 has disclaimed interest and no longer represents Respondent's employees at this time, it did maintain and enforce, for a period of time, its collective-bargaining agreement covering Respondent's employees. Therefore, I shall recommend the usual remedies applicable in such cases.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and Local 97 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (2) of the Act by rendering unlawful assistance to Local 97 in connection with the Local's organization of Respondent's employees.

4. Respondent violated Section 8(a)(1), (2), and (3) of the Act by executing, maintaining, and enforcing a collective-bargaining agreement with Local 97, which agreement contained a union-security provision, at a time when Local 97 did not represent an uncoerced majority of Respondent's employees.

5. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

[Recommended Order omitted from publication.]